In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California, et al.,

Appellants,

vs.

VINCENT MIRANDA, et al.,

Appellees.

On Appeal from the United States District Court for the Central District of California

Appellants' Brief

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

TEXTS, STATUTES & AUTHORITIES

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OPINION BELOW

The opinion of the three-judge panel of the United States District Court for the Central District of California is set forth in Exhibit A to the Jurisdictional Statement filed herein.

JURISDICTION

On March 20, 1974, Notice of the pendency of the action to the Attorney General of California was filed by the three-judge panel of the United States District Court pursuant to Title 28, United States Code section 2284(2). The judgment of the three-judge panel was filed on June 4, 1974.

Notice of appeal was filed on July 5, 1974. The jurisdiction of the Supreme Court to review the judgment of the court below on direct appeal is conferred by Title 28, United States Code, section 1253.

QUESTIONS PRESENTED

1. Whether California's obscenity statutes, as authoritatively construed by California Appellate Courts, meet the constitutional standards set forth by this Court in *Miller v. California,* 413 U.S. 15 (1973).

2. Whether abstention is compelled where the federal action would have a disruptive effect on a valid ongoing state prosecution.

3. Whether the three-judge court, improperly constituted by failure to follow the procedures mandated by 28 U.S.C. 2284, deprives that court of jurisdiction to proceed and voids subsequent injunctive orders by that court.

STATUTES INVOLVED

California Penal Code sections 311, 311.2 *et seq.,* 312, and California Penal Code sections 1526, 1536 and 1540. (These statutes are set forth in Appendix E of the Jurisdictional Statement on file herein.)

STATEMENT

Appellees are the owners of the Pussycat Theater located at 6177 Beach Boulevard, Buena Park, California. This theater exhibits motion picture films to adults only. Said theater was open and operating during the period from November 23, 1973, to November 29, 1973.

Appellant Cecil Hicks is the District Attorney of Orange County, California, the county in which said theater is located. As such, Hicks is charged with the duty of enforcing the provisions of the California Penal Code in Orange County, California.

On November 23, 1973, the Honorable John H. Smith, Jr., Judge of the Municipal Court, Central Orange County Judicial District, along with several officers from the Buena Park Police Department, viewed a film entitled "Deep Throat" at the Pussycat Theater owned by Appellees in Buena Park, California. Based on his viewing of the film, Judge Smith believed there was probable cause to believe the film to be obscene and issued a search warrant for the seizure of the film (A. p. 36, R. p. 221).

On the same day, November 23, 1973, at about 4:30 p.m., Buena Park police officers made a seizure of another copy of "Deep Throat" which was being shown at Appellee's theater. The seizure was made pursuant to a second search warrant signed by Judge Smith. The affidavit of said warrant stated that the second copy of the film in fact differed from that seen by Judge Smith as there were additional scenes of sexual activities not present in the first film. (A. p. 40, R. 223-227).

Later that day a third seizure of a copy of the film "Deep Throat" was made. This seizure was made pursuant to a warrant signed by Judge Smith who had personally returned to the theater to again view the film. During this viewing, Officer Fontecchio of the Buena Park Police Department sat with the judge and pointed out differences between the copy being viewed and the previously seized copies. Judge Smith ordered Officer Fontecchio to seize the third copy of the film and further to seize all monies present in the theater, including money in the theater safe. Pursuant to the judge's order, the officers called a licensed locksmith who opened the theater's safe from which some $4,000.00 was seized (A. p. 40, R. pp. 223-227).

On Saturday, November 24, 1973, the Buena Park police officers deposited with Judge Smith all items which had

been seized pursuant to the three warrants. Also on that date, the officers observed a fourth copy of the film "Deep Throat" which was being shown at appellees' theater. The officers saw the film and noted that this fourth film was different from the seized copies. They reported the differences to Judge Smith who issued yet another search warrant, and a fourth seizure of the film was effected (A. p. 41, R. pp. 223-227).

On Monday, November 26, 1973, criminal complaints were filed against appellee's agents who were managing the theater and showing the films alleging violations in four counts of California Penal Code section 311.2 (A. p. 63). Those prosecutions are still pending, and have been continued at appellee's request to allow a final determination of these proceedings (A. p. 67, R. p. 285).

Additionally, on November 26, 1973, in the Orange County Superior Court, the People of the State of California applied for and were granted a temporary restraining order and order to show cause in respect to a determination of obscenity of the film "Deep Throat". In the order to show cause the Superior Court ordered appellees to appear and show cause five days later why all copies of the film "Deep Throat" in their possession in Orange County should not be ordered seized as being obscene. The order further provided that the hearing on the issue of obscenity could be had at the request of appellees at any time prior to the date scheduled, provided the court was free and the District Attorney was given one hour's notice. On appellee's request, at 2:30 p.m. on that same day such hearing was held in the Orange County Superior Court, the Honorable Byron K. McMillan, the judge who had issued the order to show cause and temporary restraining order, presiding (A. pp. 22, 64-65).

Counsel for appellees appeared at that hearing and argued that the Orange County Superior Court lacked jurisdiction to conduct such a hearing (A. p. 68, R. p. 283). He filed with the Superior Court a short document entitled "Reservation of Federal Constitutional Question", in which he stated: "Defendants . . . reserve all federal constitutional claims for purposes of federal jurisdiction." (A. p. 75, R. p. 26). When the Superior Court ruled that jurisdiction was present, counsel for appellees refused to submit to the jurisdiction of the state court. The matter was then recessed until the following morning at 9:00 a.m. for the taking of evidence, and counsel for appellees was advised that if appellees failed to make an appearance the hearing would be held in their absence.

On Tuesday, November 27, 1973, in open court, testimony was heard from witnesses, including an expert witness, and the court viewed the film. Based on the evidence, the court ruled that the film "Deep Throat" was obscene beyond any reasonable doubt. The court then issued an "Order of Seizure After Adversary Hearing" by which officers were directed to seize any copies of "Deep Throat" currently at the Buena Park Pussycat Theater or which were to be found there in the future, and to bring the same before the court. This order was served upon the theater that day. No seizure was made, however, as no copies of the film were present (A. p. 74, R. pp. 324-325).

On November 29, 1973, appellees filed a complaint in the United States District Court for the Central District of California by which they sought damages together with declaratory and injunctive relief (A. p. 10). The case was assigned to Judge Warren J. Ferguson who disqualied himself, giving as his reasons the fact that he was the attorney who incorporated the City of Buena Park and had served

as the City Attorney of Buena Park from 1953 until 1959 (A. p. 20, R. p. 11).

On December 28, 1973, an order denying a temporary restraining order was issued by United States District Judge Lawrence T. Lydick. The order reflects Judge Lydick's finding that the record is totally devoid of any showing of wrongdoing by appellants:

> "The record before us shows that on November 23 and 24, 1973, law enforcement officers, executing validly issued search warrants on four separate occasions, seized prints of the film 'Deep Throat' as well as display posters and cash receipts in connection with alleged separate violations by plaintiff corporation and others of California Penal Code sections 311, 311.2 and 311.5, popularly known as the California Obscenity Statute.
>
> Thereafter on November 26, 1973, defendant Hicks as District Attorney for the County of Orange applied to and obtained from the Superior Court of the State of California an order to show cause addressed to plaintiffs and others as to why all copies of the film should not be declared obscene and plaintiffs and other respondents permanently enjoined from further exhibition of it. Adversary hearing on the order to show cause was noticed for and held on November 27 and 28, 1973, at which these plaintiffs and others appeared by counsel. The Superior Court, after viewing the film and taking other evidence, declared it obscene and ordered all copies found in plaintiff's corporation's theater seized. This action was filed in this Court the next day, attacking on procedural as well as substantive grounds the actions of defendant and the State courts.
>
> In our view plaintiffs have failed totally to make that showing of irreparable damage, lack of an adequate legal remedy and likelihood of prevailing on the merits needed to justify the issuance of a temporary restrain-

ing order which would require police officers, elected public officials and officers of the California courts to disobey the orders of those courts and would restrain the lawful enforcement of a State statute. The seizures complained of were made pursuant to warrants issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding was made available and utilized. Procedurally, therefore, the seizure was constitutionally permissible and no return of the film or other material seized is required." (A. p. 57, R. pp. 182-185).

Judge Lydick determined, however, that other issues presented by appellees' complaint required the empanelment of a three-judge court:

> "The substantive question of whether or not the challenged State statutes are unconstitutional and enforcement thereof should accordingly be restrained, and ancillary questions with respect thereto including the appropriateness of abstention, may be heard and determined only by a district court of three judges under 28 U.S.C. Section 2281. Having determined that the constitutional question raised is not, legally speaking, non-existent, that the complaint at least formally alleges (C.T. p. 184) a basis for equitable relief and that the case presented otherwise comes within the requirements of the three-judge statute even though the prayer seeks declaratory judgment only as to the constitutionality question, notification and certification in accordance with 28 U.S.C. Sections 2281 and 2284 will issue from this Court seeking appointment of a statutory three-judge court to hear and determine the cause." (A. pp. 57-58).

On January 8, 1974, an order designating the Honorables Ely, Ferguson and East as the three-judge court to hear the case was entered by Judge Chambers, Chief Judge for

the Ninth Circuit (This order was forwarded to appellants on February 8, 1974.) (A. pp. 82-85, R. 341-342).

Also on January 8, 1974, Mr. Bayley, manager of appellee's theater and a defendant in the state court prosecution, filed a motion to suppress as illegally seized the four copies of "Deep Throat" (A. p. 80, R. pp. 365-367). On January 15, 1974, the state criminal complaint was amended to include appellees (A. p. 92, R. p. 574).

On January 29, 1974, appellants filed an answer in the action pending in the United States District Court. The answer was supported by certified documents and declarations signed under penalty of perjury (essentially the same documents and affidavits presented to Judge Lydick in opposition to the temporary restraining order) (A. p. 87). On that same day the Orange County Municipal Court granted appellees' motion to suppress as to two of the copies of "Deep Throat". The motion was denied as to the other two copies. On February 15, 1974, appellants filed notice of appeal from the Orange County Municipal Court's order of suppression (A. p. 87, R. pp. 404-405).

On February 7, 1974, appellees filed motion to dismiss claim of damages without prejudice and submitted an affidavit in support thereof. At that same time, appellants moved for summary judgment. On March 4, 1974, District Court Judge Ferguson granted appellees' motion to dismiss, but denied appellants' motion as "moot".

On March 20, 1974, a memorandum was issued by Judge Ferguson on behalf of the three-judge court ordering the issue of harassment submitted on affidavits and requesting additional points and authorities on the issue of the constitutionality of the state statutes (A. p. 89, R. pp. 427-428). Neither appellees nor appellants submitted additional affidavits. Thus, the three-judge court had before it only the original affidavits presented to Judge Lydick.

On June 4, 1974, the three-judge court issued its memorandum opinion (Jurisd. Statement A. pp. 1-21). A notice that a motion for relief from judgment to amend and alter judgment and to correct errors in the judgment pursuant to Federal Rules of Civil Procedure, Rules 59(a) and (d), 60(a) and (b), and 62 would be made on July 1 was filed by appellants Gourley, Fontecchio, Hafdahl and Harrison on June 14, 1974 (A. p. 90, R. p. 531). Petitions for Rehearing under Rule 60(b) of the Federal Rules of Civil Procedure were filed by the other appellants. A motion to stay the proceedings was also filed (A. p. 91, R. p. 533A).

On July 26, 1974, the Appellate Department of the Orange County Superior Court reaffirmed the validity of all the seizures in this criminal action and acknowledged that a valid adversary hearing on the issue of obscenity had been held (A. p. 131).

On Monday, July 29, 1974, Deputy District Attorney Sears informed the Orange County Superior Court that the film "Deep Throat" was still being shown and asked whether the court wished to issue a warrant for its seizure. An adversary hearing having been had on November 26 and 27, 1973, the court issued a search warrant and several seizures occurred between Monday, July 29 and Friday, August 2, 1974, each on a separate warrant, and each being the source of a new prosecution against the theater, employees etc. (A. pp. 106-112). Those prosecutions are presently pending.

In addition, on July 30, 1974, the state court, upon affidavit of a police officer, issued a search warrant for the seizure of the film "Devil in Miss Jones" which was being shown at the same theater in conjunction with "Deep Throat" (A. pp. 108-109). On July 31, 1974, a second search warrant was issued and a second copy seized (A. p. 110).

This search warrant was issued in conjunction with an order to show cause by which appellees were directed to appear on Friday, August 2, 1974, at 2:00 p.m., or at any earlier time at appellees' request, and show cause why all copies in possession of the theater should not be seized. The warrant further provided that if appellees had no additional copies available for showing, the second copy would be returned pending the August 2, 1974, hearing. As to each seizure, state criminal complaints have been filed and are pending (A. p. 118).

On Saturday, August 3, 1974, the Federal Court issued an order to show cause *in re* contempt and a temporary restraining order. All defendants in the Federal action were ordered to appear on August 12, 1974, and show cause why they should not be found in contempt of the order to return issued on the declaratory judgment of the three-judge court. Seizures of the movies "Deep Throat" and "Devil in Miss Jones" were temporarily restrained as violative of the June 4, 1974, order and appellants were further ordered to show cause why future seizures and prosecutions should not be prohibited and all items seized ordered returned (Jurisd. Statement E). In all other respects appellees' request was denied.

On August 12, 1974, Judge Ferguson heard argument and indicated that the three-judge court was considering whether this Court's dismissal of the appeal in *Miller v. California,* for "want of a substantial question" on July 26, 1974, required reversal of the three-judge court's opinion. Judge Ferguson indicated that the issue was a "different one", and that he did not know when an opinion by that court would be forthcoming.

On August 22, 1974, a notice of direct appeal to the United States Supreme Court pursuant to 28 U.S.C. sec-

tion 1253 having been duly filed, the appropriate filing fees having been paid, the record on appeal having been certified and the jurisdictional statement having been served, the appeal was docketed with the United States Supreme Court.

On September 30, 1974, the three-judge court issued its supplemental opinion and its purported amended judgment in which the court reiterated its finding that the California obscenity statutes are unconstitutional on the theory that the dismissal "for want of a substantial federal question" of the appeal in *Miller v. California,* ..... U.S. ....., 41 L.Ed.2d 1158 by this Court is not a decision on the merits of binding precedential effect (A. p. 121).

The three-judge court, in that opinion, modified the judgment as follows:

> At the January 29th proceeding in the Municipal Court, the Assistant District Attorney stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal Court judge agreed that "the stipulation will be received as stated."
>
> It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.
>
> Paragraph *two* of the judgment of this court will be amended to read as follows:
>
> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park.
>
> Except as the judgment will be so modified, the motions of the defendants are denied.

SUMMARY OF ARGUMENT

1. The district court erred in determining that California's obscenity statutes are unconstitutionally vague under the test set forth by this Court in *Miller v. California*, 413 U.S. 15 (1973). As authoritatively construed by California appellate decisions those statutes specifically define the proscribed conduct within the guidelines set forth by this Court by defining obscene material as material depicting or describing explicit acts of masturbation, oral copulation, sadism, masochism and graphic depiction of sexual activity as constituting "hard-core" pornography.

2. Abstention is compelled where intervention by the Federal court would have a disruptive effect on an ongoing state prosecution in which the federal plaintiff has the opportunity to vindicate the Constitutional claims which are the subject of his request for federal injunctive or declaratory relief. There was such an ongoing state prosecution in this case as appellees had been named defendants in an action by which state officials sought an order for seizure of all copies of the film "Deep Throat", due to an identity of interest between appellees and their agents and employees who were defendants in a state criminal prosecution, the subject of which was appellees' obscene films which were subject to destruction pursuant to California Penal Code section 312, and because, by the time abstention was considered by the three-judge court, the state criminal complaint had been amended to include appellees. Moreover, the three-judge court erred in finding harassment by state authorities in this case.

3. Because the three-judge court was improperly convened and improperly constituted under Title 28, United States Code, section 2284, that court lacked jurisdiction to proceed in the matter and its subsequent injunctive orders must be deemed void.

ARGUMENT

I. California's Obscenity Statutes, as Authoritatively Construed by California Appellate Courts, Are Constitutionally Valid Under the Test Set Forth in Miller v. California.

By a memorandum opinion filed June 4, 1974, the three-judge District Court held California Penal Code sections 311 and 311.2 *et seq.* unconstitutionally vague under the test set forth by this Court in *Miller v. California*, 413 U.S. 15 (1973). The District Court stated:

> "In summary, we find (1) the California obscenity statute as written does not meet the specificity test of *Miller* and (2) the California courts, in interpreting the statute may have liberalized it beyond its wording but have not specifically construed it so as to give fair notice as to what is constitutionally prohibited."

Adopting this conclusion, the three-judge panel specifically rejected the prior holding of the California Court of Appeal in the post-*Miller* decision of *People v. Enskat*, 33 Cal. App.3d 900, 109 Cal.Rptr. 433 (1973). In *Enskat*, the California court determined that the California statutes, as construed, meet the test of *Miller*.

We submit that the three-judge court erred in this finding, and that the California obscenity statutes, as authoritatively construed by California courts, are sufficiently specific in defining the prohibited conduct.

A.

In *Miller*, this Court established new guidelines for the regulation of obscenity by the state and federal governments. Significantly, however, this Court did *not* invalidate the California statutes involved in *Miller*, but, rather, remanded the matter to state courts for reinterpretation of these statutes in light of the new definitions of obscenity

set forth in that opinion. In so doing, this Court stated that valid obscenity regulations must specifically define the conduct proscribed "by the applicable state law as written *or authoritatively construed.*" *Miller v. California, supra,* at p. 24. Indeed, this passage is followed by a footnote which states: "We do not hold, as Mr. Justice Brennan intimates, that all states other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereinafter, may well be adequate. *Miller v. California, supra,* 413 U.S., at p. 24, fn. 6.

To the same effect, this Court stated in *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973):

> "In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in the Paris Adult Theater I or II provided that the applicable Georgia law, as written *or authoritatively interpreted by the Georgia courts,* meets the First Amendment standard set forth in *Miller v. California, supra,* 413 U.S., at 23-25, 37 L.Ed.2d at 431." *Id.* at p. 69.

Speaking on the same subject in the companion case of *United States v. 12 Two Hundred Foot Reels,* 413 U.S. 123 (1973), this Court construed the federal statutes relating to obscenity in accordance with the *Miller* decision noting "while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes. . . ." *Id.* at p. 130, fn. 7.

Thus, this Court continues to recognize the propriety of state courts authoritatively construing their statutes relating to obscenity as well as other First Amendment areas so that those statutes fall within constitutional guidelines. Interpretations of state statutes by state courts have the same effect as amendments to those statutes by the

state Legislature. *Cramp v. Board of Public Instruction,* 368 U.S. 278, 285 (1961). See also *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 369 (1971); *United States v. Reidel,* 402 U.S. 351, 356-357 (1971); *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 687-688 (1959); *Winters v. New York,* 333 U.S. 507 (1948).

B.

California Penal Code section 311 defines obscene matter as follows:

> "[a] 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in the description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance."

Enacted in 1961, and unchanged in its material parts since, Penal Code section 311 is derived from the language of this Court in *Roth v. United States,* 354 U.S. 476 (1956), and *Memoirs v. Massachusetts,* 383 U.S. 413 (1965). In *Miller v. California,* 413 U.S. 15 (1973), however, this Court announced a new definition of obscenity as follows:

> "(a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,
>
> (b) Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law,
>
> "(c) Whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value." *Id.* at p. 24.

This Court also defined in *Miller* the type of conduct which may be forbidden by state laws under part (b) of the above test as:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at p. 25.

Thus, the *Miller* definition of obscenity differs in only two ways from the *Roth/Memoirs* definition and the definition in the California Penal Code. First, the words "utterly without redeeming social value or importance" have been replaced by the phrase, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Second, part (b), or the poriton of the *Memoirs'* definition which deals with "patently offensive" material, has been replaced by the phrase which sets as the standard, "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law."

The first element of California Penal Code section 311—that the predominate appeal of the matter to the average person, applying contemporary standards, is to the prurient interest—is identical to the first of the three *Miller* requirements set forth above. The question therefore presented is whether the statutes, as written or construed, meet the requirements of parts (b) and (c) of the *Miller* standard.

C.

By requiring that the matter must go "substantially beyond customary limits of candor in description or representation of such matters", California Penal Code section 311 is substantially the same as the *Miller* formulation (b)

set forth above. It is true, of course, that part (b) of the standard set out in *Miller* requires that these matters must be "specifically defined by the applicable state law." We submit, however, that, contrary to the finding by the three-judge panel, previous California cases have authoritatively construed this statute and have so limited it.

In *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800 (1963), the California Supreme Court stated:

> "In substance these courts, applying the rulings of the United States Supreme Court, hold that if material is commercial obscenity of saleable pornography it is obscenity in the sense that it is utterly without redeeming social importance; it is hard-core pornography; as such it lies outside the protective embrace of the First Amendment. If it is a serious work of literature or art, then it possesses redeeming social importance and obtains the benefit of the constitutional guarantees." *Id.* at p. 918.

Moreover, the court stated:

> "By embracing the term 'utterly' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was totally devoid of social importance. The only material that falls into the latter category is hard-core pornography." *Id.* at p. 920.

Thus it is plainly recognized in California law that the only material which may be prosecuted as obscene is "hard-core" pornography; that is to say, that material which is "utterly without redeeming social importance."

Moreover, the material must be "designed to stimulate sexual feelings and act as an aphrodisiac." This must be the dominant theme of the matter "taken as a whole." *In re Van Geldern*, 14 Cal.App.3d 838, 843, 92 Cal.Rptr. 592 (1971); *Dixon v. Municipal Court*, 267 Cal.App.2d 789, 73

Cal.Rptr. 587 (1968) [disapproved on other grounds in *People v. Barrows,* 1 Cal.3d 821, 83 Cal.Rptr. 819 (1970).]. Further, it is settled law in California that in order to be regarded obscene, the matter must contain a *graphic description of sexual activity,* and must appeal to a prurient interest in sex. Accordingly, the representation of the nude human form in a nonsexual context does not offend Penal Code section 311 *et seq. People v. Noroff,* 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967) ["nudist magazine" held not obscene]. See also *In re Panchot,* 70 Cal.2d 105, 73 Cal.Rptr. 689 (1968) [photographs depicting nudity held not obscene]; *In re Giannini,* 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968) [nude dancing by live performer held not obscene]; *People v. Rosakos,* 268 Cal.App.2d 497, 74 Cal.Rptr. 34 (1968) [photographs depicting nudity held not obscene].

The purpose of specificity is to afford the potential defendant with notice of that for which he may be held accountable by clarifying the perimeters of the proscribed conduct. We submit, however, that *Miller's* demand for specificity does not require a detailed statutory enumeration and description of *all* of the types of sexual activity sought to be proscribed as obscene. Rather, this Court concluded in *Miller* that obscenity statutes may be upheld, despite "the inability to define regulated materials with ultimate, god-like precision. . . ." *Id.* at p. 28. Such detail is not required under the holding of *Roth v. United States, supra,* 354 U.S., at p. 491.

Although we view it unnecessary that to avert the constitutional infirmity of vagueness the statute must recite a detailed "blueprint" of the proscribed conduct, the conclusion of the three-judge District Court that "The term 'hard core pornography' is no more precise than the term 'obscenity'." must be rejected. In *People v. Noroff, supra,* the California Supreme Court stated:

"The graphic depiction of such sexual activity seems to be the distinguishing feature of the only materials which the United States Supreme Court has ever ruled obscene. The publications involved in *Ginzburg v. United States, supra*, 383 U.S. 463, contained descriptions and photographic essays dealing explicitly and dynamically with sexual relations; the court noted that the petitioners were guilty of '*animating* sensual detail to give the publication a salacious cast. . . .' (Italics added.) (*Id.*, at p. 471 [16 L.Ed.2d at p. 38].) The materials at issue in *Mishkin v. New York* (1966) 383 U.S. 502 [16 L.Ed.2d 56, 86 S.Ct. 958], portrayed 'sexuality in many guises. Some depict[ed] relatively normal heterosexual relations, but more depict[ed] such deviations as sado-masochism, fetishism, and homosexuality. Many [had] covers with drawings of scantily clad women being whipped, beaten, tortured, or abused. . . .' (*Id.*, at p. 505 [16 L.Ed.2d at p. 60].) Finally, the film central to the litigation in *Landau v. Fording, supra*, 387 U.S. 456, 'explicitly and vividly revealed acts of masturbation, oral copulation, . . . sadism, masochism and sex' (245 Cal.App.2d 820, 822, affd. *per curiam*, 387 U.S. 456). *Such materials, and no others, have been thought to constitute 'hard core pornography.'*" (Emphasis added). *Id.* at p. 794, n. 6.

Accordingly it is submitted that, as held in *People v. Enskat, supra*, previous decisions of California Appellate Courts have authoritatively construed California obscenity statutes, meeting the specificity requirements of *Miller*.

D.

Finally, as earlier noted, part (c) of the *Miller* formulation abandons the requirement of *Roth* and *Memoirs* that allegedly obscene matter be "*utterly without redeeming social importance*", and in place of that test adopts a requisite that the questioned matter, taken as a whole, "*not*

have serious literary, artistic, political, or scientific value." *Miller v. California, supra,* 413 U.S., at p. 24. This does not, however, compel the conclusion that California Penal Code section 311 *et seq.* is constitutionally defective because it includes the earlier *Roth* language.

Plainly, the states are at liberty to impose more stringent standards for obscenity prosecutions than are constitutionally required. In *Paris Adult Theater I v. Slaton, supra,* this Court stated:

> "It should be clear from the outset that we do not undertake to tell the States what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material." 413 U.S., at pp. 53-54.

As early as *Winters v. New York,* 333 U.S. 507 (1947), this Court recognized that the states have the power to broaden the range of permissible conduct before punishable acts of obscenity are reached. The constitutional concern is only that the state "does not transgress the boundaries fixed by the Constitution for freedom of expression." *Id.* at p. 515. That application of the *Roth* "utterly without redeeming social importance" standard is constitutionally inoffensive was recognized by this Court in *Hamling v. United States,* ..... U.S. ....., 41 L.Ed.2d 590 (1974):

> "Petitioners' final Miller-based contention is that our rejection of the third part of the Memoirs test and our revision of that test in Miller indicates that 17 USC § 1461 [18 USCS § 1461] was at the time of their conviction unconstitutionally vague for the additional reason that it provided insufficient guidance to them as to the proper test of 'social value.' But our opinion in Miller plainly indicates that we rejected the Memoirs 'social value' formulation, not because it was so vague as to deprive criminal defendants of adequate notice, but instead because it represented a departure from

the definition of obscenity in Roth, and because in calling on the prosecution to 'prove a negative' it imposed a '[prosecutorial] burden virtually impossible to discharge' and which was not constitutionally required. Miller v. California, 413 U.S., at 22, 37 L.Ed.2d 419. *Since Miller permits the imposition of a lesser burden on the prosecution in this phase of the proof of obscenity than did Memoirs, and since the jury convicted these petitioners on the basis of an instruction concededly based on the Memoirs test, petitioners derive no benefit from the revision of that test in Miller.*" (Emphasis added.)

It is therefore submitted that the District Court erroneously concluded that California's obscenity statutes fail to meet the standard set forth by this Court in *Miller v. California.*

II. The Federal Court Should Have Abstained from Intervention in Ongoing State Criminal Proceedings.

In a series of recent decisions, this Court has outlined the policy which must be followed by Federal courts when asked to intervene by way of injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in a state court. In *Younger v. Harris,* 401 U.S. 37 (1971), this Court emphatically reaffirmed "the fundamental policy against federal interference with state criminal prosecutions." 401 U.S., at p. 46. Similarly, federal declaratory relief has been held improper when a prosecution involving the challenged statute is pending. *Samuels v. Mackell,* 401 U.S. 66 (1971). Most recently, in *Steffel v. Thompson,* 415 U.S. 452 (1974), this Court stated:

"Sensitive to principles of equity, comity, and federalism, we recognized in *Younger v. Harris, supra,* that federal courts should ordinarily refrain from enjoining ongoing state criminal prosecutions. We were cognizant

> that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . .' *Robb v. Connolly,* 111 U.S. 624, 637, 28 L.Ed. 542, 4 S.Ct. 544 (1884)." *Id.* at pp. 460-461. See also *Perez v. Ledesma,* 401 U.S. 82 (1971); *Dyson v. Stein,* 401 U.S. 200 (1971); *Byrne v. Karalexis,* 401 U.S. 216 (1971).

The clear holding of these cases may be summarized as follows: absent exceptional and extremely limited circumstances, Federal courts must not intervene, either by injunction or declaratory judgment, in an existing state prosecution. Such interference with state court criminal proceedings is not justified except when there is a danger of great, immediate and irreparable injury to the federal plaintiff, where the state law is flagrantly and patently violative of express constitutional prohibitions, or where there is a showing of bad faith, harassment or other unusual circumstances that would call for equitable relief. *Mitchum v. Foster,* 407 U.S. 225, 230 (1972). This policy of abstention rests on Federal recognition that state courts share a responsibility to protect the constitutional rights of the plaintiff in the Federal action. Crucial to the inquiry on the issue of abstention, therefore, is the existence of a state court action in which those constitutional claims may be considered by the state courts.

We submit that, contrary to the finding by the District Court, there was a pending state prosecution against plain-

tiffs herein, and that there existed none of the exceptional circumstances outlined above. Accordingly, abstention was appropriate in this case.

At the outset we submit that the District Court erroneously concluded "Plaintiffs here have no prosecutions pending against them, and have made no allegations that any are threatened", in support of the determination that abstention was improper. On the contrary, it must be concluded that there was an ongoing state prosecution at the commencement of the federal proceedings in this case. This conclusion is compelled by any of several factors.

The record indicates that on November 26, 1973, three days prior to the filing of the complaint in the District Court, appellees were *named defendants* in an action brought by appellants in the Orange County Superior Court. (Indeed, this fact appears in the affidavit by counsel for appellees, appended to the complaint filed herein in the District Court.) By this action appellants sought an order for seizure of all copies of the film "Deep Throat" in appellees' possession, following an adversary hearing in which appellants sought to prove that film obscene under California law. Following a declaration of their view that the California Superior Court lacked jurisdiction to conduct such a hearing, appellees declined to participate further in those proceedings. We submit, however, that this action must be deemed an ongoing state prosecution within the meaning of *Younger v. Harris, supra,* and *Samuels v. Mackell, supra.* Various lower federal courts have adopted this view, reasoning that such state actions for injunctions are criminal prosecutions on the theory that such actions are of a quasi-criminal nature, intended as an equitable remedy against criminal conduct. *Maseo v. Cannon,* 326 F.Supp. 1315, 1317 (D.C. Ed. Wis. 1971). See also *McCue v.*

City of Racine, 330 F.Supp. 466, 468 (D.C. Ed. Wisc. 1971), *vacated on other grounds,* 351 F.Supp. 811 (1972). Most significantly, this hearing, together with the exercise of appellate remedies in the California Court of Appeal following any adverse result, provided appellees with a state court forum and an opportunity to air each of the Federal Constitutional challenges which were the subject of the federal action herein. It is precisely this availability of a state court forum, together with principles of comity and equity which underlie the doctrine of abstention.

Moreover, the apparent conclusion of the three-judge panel that the prior holding of the California Court of Appeal in *People v. Enskat,* 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (1973), represented the law in California, unchallengeable except in a subsequent case before the California Supreme Court, is erroneous. It is a well settled proposition of California law that an opinion of the California Court of Appeal of one district is not binding as precedent on a Court of Appeal of another district, and is, instead, entitled to only as much weight as the logic of the opinion commands. See *People v. Cisneros,* 34 Cal.App.3d 399, 427, 110 Cal.Rptr. 269 (1973); *People v. Muir,* 244 Cal.App.2d 598, 603, 53 Cal.Rptr. 398 (1966); *Richard v. Degen and Brady, Inc.,* 181 Cal.App.2d 289, 303-304, 5 Cal.Rptr. 263 (1960). Appellees' appellate forum would have been in the California Court of Appeal, Fourth District. *Enskat* is an opinion of the California Court of Appeal, Second District. Nor does the fact hearing was denied by the California Supreme Court in *Enskat* compel the conclusion that the decision must be followed as to all the reasoning included therein. *In re Henley,* 9 Cal.App.3d 924, 931, 88 Cal.Rptr. 458 (1970). In any event, as a part of appellees' California appellate remedies they would have been entitled to petition for hearing in the California Supreme Court, seeking review

of any unfavorable ruling by California's intermediate appellate court. Thus, this pending state court prosecution provided appellees with a state forum as envisioned in the policy previously enunciated by this Court. It is absurd to suggest that appellees' determination not to participate in those proceedings permits the conclusion that there was no ongoing state prosecution.

On a wholly independent basis, it must be recalled that, following the original seizures of the film pursuant to validly issued search warrants, criminal complaints were filed in state court on November 26, 1973. By these complaints it was alleged that appellees' agents and employees had violated California's obscenity statutes by exhibition of those films. These state court prosecutions were obviously ongoing at the time of the filing of the federal complaint, and we submit that a clear-cut identity of interest existed between appellees and the defendants in the state court criminal action. It must be recognized, after all, that the films which constituted the subject matter of the state criminal action were those to which appellees enjoyed a right to possession. In this vein it should be observed that yet another theory exists in support of the conclusion that appellees were subject to an ongoing state prosecution. Those films which had been seized and which were the object of the criminal prosecution were subject to the provisions of California Penal Code section 312, which declares:

> Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

Thus, as the films themselves were the subject of a proceeding which must be regarded as *in rem* in character in association with the state court prosecution, appellees' ownership of those films necessarily involved them in the ongoing state criminal action. Significantly, appellees were entitled to seek return of that property at the conclusion of the criminal proceeding, in the event that convictions were not obtained, by a claim and delivery action. See *Barnhard v. Municipal Court,* 142 Cal.App.2d 324, 337, 298 P.2d 679 (1956). The return of those films to appellees would also be the result of any successful challenge to the prosecution by the defendants throughout the course of the criminal proceedings. Thus, for example, the motion to suppress the evidence as illegally seized, made by appellees' agent Bailey in the state criminal proceeding pursuant to the provisions of California Penal Code section 1538.5 must be deemed to represent appellees' interest, as well as his own. By the forum available in that motion, as well as the full range of appellate procedures available under state law in the event of an adverse ruling therein, appellees were also provided with a state forum in which to vindicate the Federal Constitutional claims which constitute the subject of the federal action herein. Thus, we submit, the District Court erroneously failed to recognize that the state prosecution of appellees' agents, ongoing at the time of the filing of federal action, constituted a state court prosecution involving appellees' property interests, and that, due to the identity of interests, that prosecution ought to have been deemed a state prosecution within the meaning of *Younger* and *Samuels.* In a substantially analogous situation Chief Justice Burger recently observed in his concurring opinion in *Allee v. Medrano,* ..... U.S. ....., 40 L.Ed.2d 566 (1974):

"To the extent that they can prove standing, the individual appellees will be seeking federal court interference in their own state court prosecutions. The Union, to the extent that it has standing, will be seeking interference with state court prosecution of its members. There is an identity of interest between the Union and its prosecuted members; the Union may seek relief only because of the prosecutions of its members, and only by insuring that such prosecutions cease may the Union vindicate the constitutional interests which it claims are violated. The Union stands in the place of its prosecuted members even as it asserts its own constitutional rights. The same comity considerations apply whether the action is brought in the name of the individually arrested Union member or in the name of the Union, and there is no inequity in requiring the Union to abide by the same legal standards as its members in suing in federal court. If the Union were unable to meet the requirements of Younger, its members subject to prosecution would have a full opportunity to vindicate the First Amendment rights of both the Union and its members in the state court proceedings. Any other result would allow the easy circumvention of Younger by individuals who could assert their claims of First Amendment violation through an unincorporated association of those same individuals if the association is immune from Younger burdens." *Id.* at pp. 589-590.

Plainly, to order return of the property, already found presumptively obscene by California courts, constituted an unwarranted intrusion and intervention in a valid ongoing state prosecution. In *Perez v. Ledesma, supra,* 401 U.S. 82 (1971), this Court noted:

"Although the three-judge Court declined to issue an injunction against the pending or any future prosecutions, it did enter a suppression order and require the return of all the seized material to the appellees. . . .

> *It is difficult to imagine a more disruptive interference with the operation of the state criminal process short of an injunction against all state proceedings.*" (Emphasis added.) *Id.* at pp. 83-84.

While it is true that the parties in the state court proceeding had entered into a stipulation by which it was agreed that, for the purposes of the criminal trial, only one film would be shown and all seized copies would be deemed the same, it is equally true that, once returned to appellees, the other copies of the film would be beyond the reach of the state court. The effect, of course, would be to render California Penal Code section 312 inoperable.

Yet another factor exists which compels the conclusion that abstention was appropriate to avoid intervention in an ongoing state prosecution. It must be recalled that the criminal complaint pending in state court was amended on January 15, 1974, to include appellees. Thus, at the first time in this case at which the District Court considered the question of abstention, there was a pending state prosecution against appellees.

Parenthetically, we do not agree with Judge Lydick's conclusion that the question of abstention should be deferred for consideration by the three-judge panel. We submit that Judge Lydick's conclusion that the appropriateness of abstention is an "ancillary" question which "may be heard and determined only by a district court of three judges" is incorrect. On the contrary, we submit, if the allegations in the complaint and supporting affidavits are insufficient to show exceptional circumstances which would warrant intervention by Federal courts in state prosecutions, there is no need for the convening of a three-judge court and the District Court should dismiss without a hearing on

the merits. This view has been adopted by District Courts in the same district in which the case under review was filed. See *Inland Empire Enterprises, Inc. v. Morton,* 365 F.Supp. 1014, 1019 (D.C. CD. Cal. 1973); *Veen v. Davis,* 326 F.Supp. 116, 120-121 (D.C. CD. Cal. 1971). See also *Harrington v. Arceneaux,* 367 F.Supp. 1268, 1270 (D.C. WD. La. 1973); *Alga, Inc. v. Crossland,* 327 F.Supp. 1264, 1266 (D.C. ND. Ala. 1971). In view of Judge Lydick's specific finding that there had been no harassment by appellants, together with the absence of exceptional circumstances herein, we submit that abstention was appropriate. Judge Lydick's dismissal of the action on that ground would have been reviewable in the Court of Appeals for the Ninth Circuit.

Nevertheless, it is submitted that the pending state court prosecutions of appellees *at the time the issue was considered by the three-judge panel* should control on the question of the existence of such an ongoing state action. In its supplemental opinion of September 30, 1974, the District Court concluded that this Court's holding in *Steffel v. Thompson, supra,* 415 U.S. 452 (1974), dictates that the absence of a state criminal prosecution against the federal plaintiff at the time the federal action is filed compels the conclusion that no such prosecution is pending, even if commenced after the federal action is filed. This, we submit, constitutes a misapplication of the doctrine of *Steffel.* The significant distinction in *Steffel* is the fact that in that case the petitioner was confronted with the unenviable choice of breaking state law and subjecting himself to certain arrest, or in abandoning the exercise of what he construed to be constitutionally protected activities. Petitioner determined not to break the state law and be subjected to arrest; petitioner was therefore without a forum in which to vindicate

his constitutional claims. Concluding that federal abstention was improper in such circumstances, this Court noted:

> "In addition, while a pending state prosecution provides the Federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally floating state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Id.* at p. 462.

Thus, we perceive three possible situations. First, where a state criminal prosecution has been commenced prior to the filing of the federal action, the clear command of *Younger* and *Samuels* is Federal abstention. At the other extreme, where, as in *Steffel,* the federal plaintiff determines not to break the state law and is thus without an opportunity to vindicate his constitutional challenge to the questioned statute, abstention is improper. The third situation appears in the instant case. *Here the federal plaintiff elected to engage in the conduct which constituted a violation of the state statute.* In such circumstances two possible courses of action were open to the state authorities. If, on the one hand, the authorities determined *not* to prosecute appellees, and appellees could not objectively demonstrate the prospect of any such prosecution by some conduct by appropriate state officials, it is submitted that appellees would lack standing to prosecute the federal action. See *Younger v. Harris, supra,* 401 U.S., at p. 42. On the other hand, should the state authorities initiate prosecution, appellees would be presented with the state court forum which justifies abstention. We respectfully submit that if the doctrine of abstention is not applied in this circumstance, the

federal plaintiff may indulge in the conduct forbidden by state law with impunity, seeking refuge in the Federal courts where he may attack the state statute, provided only that he files his complaint there before state authorities may properly investigate and commence criminal proceedings. A rule which promotes such a "race to the courthouse" is not only unseemly, but also is clearly destructive of the policy enunciated by this Court in *Younger* and *Samuels*. An example is illustrative. In *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), this Court commented with approval on the Georgia civil procedure employed in that case before criminal prosecution:

> "This is not to be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Id.* at p. 55.

We submit, however, that state authorities would be disinclined to exercise this civil remedy, aware that, if they did not file the criminal proceeding with all haste, the state defendant could seek sanctuary in Federal court from whence he could attack the state statutes, unfettered by the abstention doctrine. Such a result would plainly be antagonistic to those principles recognized in *Fenner v. Boykin*, 271 U.S. 240 (1926), which this Court reiterated in *Younger v. Harris, supra*:

> ". . . 'Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecution offenders against the laws of the State and must decide when and how this is to be done. The

> accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.' *Id.*, at 243-244, 70 L.Ed. at 927." 401 U.S., at p. 45.

Finally, we submit that the three-judge court's conclusion that seizures of the four different copies of the film, as well as amendment of the state criminal complaint to include appellees as defendants in that prosecution, could be viewed as evidence of harassment is patently erroneous. In its Memorandum Opinion of June 4, 1973, the three-judge panel stated:

> "Finally, the objective facts set forth in this opinion clearly demonstrate bad faith and harassment which would justify federal intervention. Any editorializing of those facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exorcise the movie 'Deep Throat' out of Buena Park."

We submit that a review of the record before that court does not justify this conclusion. In *Perez v. Ledesma, supra*, this Court stated:

> ". . . Only in cases of *proven* harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." 401 U.S., at p. 85.

Thus, harassment and bad faith are shown in those circumstances where state officials arrest or otherwise harass an

individual in an effort to discourage the exercise of protected rights, but with no intention of pressing charges or with no expectation of obtaining a conviction. *Cameron v. Johnson*, 390 U.S. 611, 659 (1967); *Gordon v. Christenson*, 317 F.Supp. 146, 149 (D.C. Cd. Utah 1970); *Mitchum v. McAuley*, 311 F.Supp. 479, 481 (D.C. ND. Fla. 1970). Moreover, plaintiffs in such cases have a heavy burden to show that the state is not making a good faith effort in commencing such a prosecution. Presumptively, the state in the exercise of its police power is doing so for a legitimate end. *Mitchum v. McAuley, supra*, at p. 481. See also *Inland Empire Enterprises, Inc. v. Morton, supra*, 365 F.Supp. at p. 1016.

Totally ignored by the three-judge court in this case is the fact that each of the seizures of the *four different* versions of the subject film were made pursuant to validly issued search warrant (A. p. 63). Significantly, each of the films were the subject of a different count of an alleged violation of California's obscenity statute. Further, on the same factual basis Judge Lydick concluded that there was no indication of bad faith or harassment. There is not the slightest indication that these actions were undertaken without expectation of obtaining valid convictions. Rather, absent unwarranted intervention by the federal court herein, we submit that the record indicates that this was the valid exercise of authority by appellants who are charged with the responsibility of enforcement of state law.

For all of the foregoing reasons, therefore, appellants respectfully submit that federal abstention was appropriate in this case. Accordingly, it was error for the District Court, ignoring the policies set forth by this Court, to refuse to abstain from the exercise of its equitable power.

III. The Three-Judge District Court, Improperly Constituted Under Title 28, United States Code, Section 2284, Lacked Jurisdiction to Proceed.

Appellants submit that the three-judge District Court herein was not duly constituted under the provisions of Title 28, United States Code, section 2284, and thus lacked jurisdiction to hear the matter and to grant injunctive relief. That statute provides:

> In an action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, *who shall designate two other judges,* at least one of whom shall be a circuit judge. Such judge shall serve as members of the court to hear and determine the action or proceeding.

Plainly, the procedure with respect to the composition of the three-judge court dictated by the statute was not followed in this case.

The record herein indicates that the case was originally assigned to District Judge Warren J. Ferguson, who disqualified himself from participation in the case (See Appendix at p. 20). The request for injunction was then submitted to District Judge Lawrence T. Lydick. Judge Lydick denied appellees' request for a temporary restraining order, finding that, on the basis of the affidavits before him, such an order would be improper due to the failure of appellees to make any showing whatever that appellants had acted in bad faith. Judge Lydick did, however, determine that a three-judge court should be impaneled to decide the constitu-

tionality of the statute, and duly certified the case to the Chief Judge of the Circuit in accordance with the provisions of Title 28, United States Code, sections 2281 and 2284. The Chief Judge of the Circuit then impaneled *three* judges: United States District Judges William G. East and Warren J. Ferguson and United States Circuit Judge Walter Ely. Thus, in plain contravention of the specific command of the statute, District Judge Lydick, the district judge to whom the application for injunction had been presented, was not included on the three-judge panel. In his stead, the Chief Judge named United States District Judge Warren J. Ferguson, who had originally disqualified himself. No explanation as to how Judge Ferguson became less disqualified to sit in the case is to be found in the record.

The statutory requirement that "the district judge to whom the application for injunction or other relief" *shall* constitute one member of such court is integral to the purpose of the statute as that particular judge is the one who makes the preliminary determination that the impanelment of a three-judge court is required. Moreover, he is the judge to whom the case is remanded once the purpose for which the three-judge court was convened has been concluded. See, *Public Service Com. v. Brashear Freight Line*, 312 U.S. 621, 625 (1941). Thus, federal courts have correctly concluded: "The court of three judges is not a different court from the District Court, but is the District Court composed of two additional judges sitting with the single District Judge before whom the application for injunction has been made." *Jacobs v. Tawes*, 250 F.2d 611, 614 (4th Cir. 1957). Significantly, Judge Lydick's opinion absolved appellants of any wrongdoing. The three-judge court, however, based on the *same* evidence which was before Judge Lydick, concluded that the "uncontroverted facts" demonstrated harassment.

The statute provides that *only* a court composed as mandated by the statute can hear and determine the matter. The word "shall" is mandatory, and a three-judge District Court which does not include the judge who first heard the matter is not a court correctly composed under the statute. It is therefore submitted that the three-judge District Court impaneled herein was incorrectly composed and was without jurisdiction to proceed in the matter. It follows necessarily that any order rendered by that court is void.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed and the complaint should be ordered dismissed.

Dated: January 12, 1974

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